ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmission	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

REPLY COMMENTS OF BET HOLDINGS II, INC.

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SUMMARY

The dispute between those commenters who opposed new digital must-carry requirements and those who supported such rules in this proceeding was predictable. Broadcasters -- although by no means all, or even the most important broadcasters -- generally supported various forms of digital must-carry, while cable operators and cable program networks opposed such requirements. Nevertheless, the initial comments in this proceeding were notable in that must-carry supporters did not rely on traditional public interest notions as much as the assertion that, without digital must-carry, broadcasters would "fail to thrive."

However, there is no public interest justification or statutory basis for giving broadcasters a risk-free transition to digital. Imposing digital must-carry rules would violate governing statutes, contravene the Constitution, and be bad policy. For these reasons, the Commission should reject digital must-carry in any form and allow consumers and industry members to define the terms of the digital transition.

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I. Introduction

Digital must-carry is statutorily impermissible, unconstitutional, and harmful to consumers. For these reasons, many parties filed comments in this proceeding opposing any sort of digital must-carry regime. BET Holdings II, Inc. ("BET"), a cable television entertainment business that reaches over 54 million cable households through its cable programming services targeted to African-American consumers, filed such comments. In its comments, BET argued that imposing digital must-carry rules concurrently with the existing requirements for analog broadcasts will give broadcasters an additional, unwarranted, federally-subsidized windfall, cause grave harm to consumers and cable programmers, and violate many FCC policies, the Telecommunications Act of 1996, the Cable Act of 1992, and the Constitution.

Despite the numerous defects in the proposed digital must-carry rules, some parties, mostly broadcasters or broadcast-related entities, filed comments favoring digital must-carry. Those commenters ignore the statutory and constitutional defects in the proposed digital must-carry rules. The Commission must not follow suit.

Many broadcasters complain loudly about the costs of converting to digital, and almost suggest that the Commission owes them digital must-carry in return for their investment. They appear to have forgotten that the Commission has already given them a gift of great value -- free spectrum worth billions of dollars. No other group involved in the digital transition has received such a valuable handout. In fact, many others involved in delivering digital programming to American consumers will incur tremendous costs to convert to digital, without the benefit of any government subsidy.

In addition, some broadcasters claim that the Commission must adopt digital-must carry rules lest broadcasters "fail to thrive."[1] It is not the Commission's role to further subsidize broadcasters' digital TV roll-out. Rather, in considering whether to implement digital must-carry rules, the touchstone of the Commission's inquiry must be what policies will best serve the public interest and promote competition, and not, as the National Association of Broadcasters ("NAB") claims, "what policies will best encourage the sale of DTV sets."[2] Broadcasters seek to alter the Commission's role and demand that the Commission guarantee their future economic viability at the expense of other voices in the cable programming marketplace. As Chairman Kennard has recognized, however, "trusting in the marketplace means giving businesses the opportunity to fail."[3] The Commission should therefore reject the proposed must-carry rules for digital television.

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1. Comments of National Association of Broadcasters ("NAB") at 18-22.

2. Comments of NAB at 16.

3. Remarks of Chairman William E. Kennard to the International Radio and Television Society, New York, September 15, 1998.

II. Digital Must-Carry Is Statutorily Impermissible

A. Digital Must-Carry During the Transition Violates Section 614(b)(4)(B)

As explained in many of the comments filed in this proceeding, including BET's, any form of digital must-carry rules would violate controlling statutes.[4] In particular, Section 614(b)(4)(B) of the Communications Act, 47 U.S.C. § 534(b)(4)(B), authorizes the Commission to impose digital must-carry rules, if at all, only after broadcasters' analog signals have been replaced with digital signals. The express language provides that the Commission

> shall initiate a proceeding to establish **any changes in the signal carriage requirements** of cable television systems **necessary to ensure cable carriage of such broadcast signals** of local commercial television stations **which have been changed** to conform with such modified standards.[5]

The quoted language could not be more clear. Section 614(b)(4)(B) permits only "necessary" changes in the rules governing carriage of signals once those signals "have been changed" from analog to digital. As the National Cable Television Association ("NCTA") explains in its Comments, Congress' deliberate choice of the phrase "have been changed" indicates that modifications to the must-carry rules for DTV would occur once digital signals have replaced analog signals.[6]

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4. BET associates itself with the Comments of National Cable Television Association ("NCTA"), which discuss at length the many statutory provisions that make "no must-carry" the only legitimate and viable alternative. NCTA also demonstrates persuasively that Section 614 as a whole is written so as to preclude digital must-carry during the transition. Furthermore, Section 615, 47 U.S.C. § 535, gives the Commission no authority to impose digital must-carry rules for noncommercial educational television stations.

5. 47 U.S.C. § 534(b)(4)(B) (emphasis added).

6. NCTA Comments, at 10-11.

Several parties, however, try to avoid this clear-cut statutory language by omitting parts of the statute, or by subjecting it to tortured grammatical constructions. For example, many broadcasters ignore the limiting phrase "which have been changed to conform with such modified standards" and then argue that the statute clearly requires immediate must-carry of digital signals.[7] To read that limiting phrase out of the statute implies that the words Congress chose are superfluous - in direct contravention of the presumption that a legislature has used no superfluous words.[8] Those words have meaning and importance, described above, that cannot be ignored simply by pretending they do not exist.

Other parties rely on tortured interpretations of the statutory language to circumvent its plain meaning. Cordillera Communications, Inc. ("Cordillera"), for example, tries to convince the Commission that the language "which have been changed" refers back to the word "stations," and that mandatory carriage of DTV signals begins as soon as the local broadcaster commences digital transmission.[9] That argument will appeal to few, if any, because the language and structure of Section 614(b)(4)(B) prove it wrong.[10] This section begins by referring to modified standards for

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7. See, e.g., Comments of Association of Local Television Stations, Inc. ("ALTV") at 8 (omitting language), Comments of Association of America's Public Television Stations et al. at 13 (omitting language); Comments of Cordillera Communications, Inc. at 3 (omitting language); Comments of Lee Enterprises, Inc. at 2 (omitting language); Comments of NAB at 5 (quoting language but ignoring it in its analysis); Comments of Paxson Communications Corporation at 11 (omitting language).

8. *Platt v. Union Pacific R.Co.*, 99 U.S. 48, 58 (1879).

9. Cordillera Comments, at 3-4.

10. *Florida Public Telecommunications Association v. FCC*, 54 F.3d 857 (D.C. Cir. 1995) (rejecting FCC's interpretation of Telephone Operator Consumer Services Improvement Act subsection where interpretation was inconsistent with plain meaning of subsection, and (continued...)

television broadcast signals, i.e. digital signal standards, and then instructs the Commission to consider whether to amend the existing must-carry rules so that signals of local broadcasters, once changed from analog to digital in conformance with those standards, can be carried. Basic rules of grammar, and plain old common sense, prevent the construction Cordillera urges.[11]

Section 614(b)(4)(B) on its face does not authorize the Commission to impose digital must-carry rules while the analog must-carry rules are in place. Absent such authorization, the Commission lacks the authority to adopt any of the six digital must-carry proposals suggested in the NPRM.[12]

B. **Imposing Digital Must-Carry During the Transition Violates Section 614(b)(5)**

Some parties also incorrectly claim that mandatory carriage of analog and digital signals would not violate the anti-duplication provision of Section 614(b)(5). As BET explained in its comments, pursuant to Section 614(b)(5), a cable operator may not be required to carry either (1) the signal of a local television station that substantially duplicates the signal of another local television station carried on its cable system, or (2) the signals of more than one local television

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10. (...continued)
nothing in the subsection's text or structure cast doubt on its plain meaning).

11. Some parties, such as Philips Electronics, incorrectly suggest that the statute requiring "no material degradation" also mandates digital must-carry. Comments of Philips Electronics North America Corporation at 7, 10. But the notion that signals must not be degraded does not translate into a digital must-carry requirement. It simply means that DTV signals, if carried, must not be degraded, and not that they must always be carried. See also Comments of Thompson Consumer Electronics, Inc. at 8-10.

12. Furthermore, as NCTA and Discovery point out, Section 624(f) of the Communications Act, 47 U.S.C. § 544(f)(1), prohibits the Commission from enacting digital must-carry requirements during the transition without express authority from Congress in Title IV. No such authority exists. See NCTA Comments at 7; Discovery Comments at 33.

station affiliated with a particular broadcast network. On its face, this provision prohibits the Commission from requiring cable operators to simultaneously carry the digital and analog signals of broadcasters.

Despite this clear statutory language, several broadcasters claim that their analog and digital signals are not duplicative because the signals have different modes of transmission.[13] Others suggest that because the two transmissions will reach different audiences, they are not duplicative.[14] These arguments are wrong for several reasons. First, the Commission has already concluded that cable operators need not carry NTSC and HDTV signals that carry the same programming.[15] It is thus content and source of programming that are significant in determining if signals are duplicative, rather than the transmission format or audience. There is no reason to revisit the Commission's conclusion. Second, Section 614(b)(5) does not speak to mode of transmission or identity of audience reached; rather, it speaks to programming that is substantially the same or is affiliated with the same broadcast network. Here, a broadcaster's analog and digital signals would be duplicative under either of the Section 614(b)(5) criteria because the programming they carry or the transmitting broadcasters (or both) would be the same.

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13. See, e.g., Comments of Granite Broadcasting Corp. at 7; Comments of Pappas Telecasting Inc. et al. at 30; Comments of Sinclair Broadcast Group, Inc. at 4-5.

14. See, e.g., Comments of Pappas Telecasting Inc. et al. at 30.

15. *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10553 (1995) (discussed in NCTA Comments at 13) (stating that "as long as the two were carrying duplicative programming, the NTSC and commonly owned HDTV stations would not both have to have been carried.").

Simultaneous digital and analog must-carry obligations would violate Section 614(b)(5) on its face. Therefore, the Commission should reject digital must-carry.[16]

III. Digital Must-Carry Is Unconstitutional

A. Digital Must-Carry Violates the First Amendment

As set forth in the comments of BET and many others, the six proposed digital must-carry options impermissibly burden speech, in violation of the First Amendment. The six options fail under the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S. Ct. 1673 (1968) and applied in the *Turner* cases[17] (hereinafter the "*Turner* test").

In their quest to attain digital must-carry rules, broadcasters and others rely heavily on the fact that the United States Supreme Court upheld the constitutionality of the Commission's analog must-carry rules in *Turner II*. Yet they fail to mention that both *Turner I* and *Turner II* were decided by the narrowest of margins, based on very specific facts and circumstances not present in this case. In *Turner I*, only a plurality of Justices joined the Court's opinion, while four Justices issued separate

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16. Some broadcasters argue not only for digital must-carry, but also for separate must-carry/retransmission consent elections for their analog and digital signals. It is unfair, they claim, to make them give up their retransmission consent agreements for their analog signals in order to obtain must-carry for their digital signals. See, e.g., Comments of NAB at 41-42. The broadcasters' separate election proposal seeks to stack the deck even further in their favor, but their proposal has no statutory support. Consequently, even if the Commission concludes it can implement digital must-carry, it is not authorized to allow separate elections.

17. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445 (1994) (*Turner I*); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 137 L.Ed.2d 369, 117 S. Ct. 1174 (1997) (*Turner II*).

opinions. *Turner II* was decided by a 5-4 margin, with only 3 Justices joining in the Court's opinion. One Justice wrote an opinion concurring in part, while 4 Justices vigorously dissented.[18]

Even if the *Turner* cases define the framework for the digital must-carry analysis, their highly discordant nature refutes the supposedly irrefutable conclusion, advocated by the majority of broadcasters, that digital must-carry rules would unequivocally withstand a constitutional challenge.[19] In fact, as shown in the comments of BET, Discovery, NCTA, and others, the *Turner* test, when applied to digital must-carry, compels the opposite outcome. The Court would not uphold a digital must-carry regime now in light of the vastly different facts at issue,[20] the failure of such rules to serve any legitimate governmental objective, and the lack of deference that would be afforded any digital must-carry regime imposed by the Commission.

1. Digital Must-Carry Rules Would Not Protect Free, Over-the-Air Broadcasting

The interest in preserving broadcast television set forth in the *Turner* cases does not apply in the digital context. Broadcasters are already protected by analog must-carry rules and

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18. See Comments of Discovery Communications, Inc. at 11-12 for a broader discussion of the Court's fragmented ruling in the *Turner* cases.

19. NAB bases its claim that digital must-carry rules are constitutional on analysis provided by Jenner & Block, which NAB treats as controlling authority. Jenner & Block represented NAB in the appeal of the *Turner* decision. As such, it is nothing more than advocacy. For an unbiased and thoughtful First Amendment analysis, see the Comments of The Media Institute (asking the Commission to treat the First Amendment issues seriously, and consider them de novo).

20. BET supports the Comments and Reply Comments of NCTA regarding the unconstitutional nature of digital must-carry, particularly with respect to the "changed circumstances" argument. Because of the vastly different circumstances in the case of digital must-carry rules, the facts underlying the analog must-carry rules upheld in the *Turner* cases do not compel the same result.

retransmission consent agreements that actually provide them not only carriage, but profit. Add to that the spectrum subsidy they received, worth billions and billions of dollars, and ALTV's claim that broadcasters are "economically frail" simply rings hollow.[21] NAB's claim that without DTV must carry, non-cable households will suffer "weakened over the air broadcasting" is similarly false, since analog programming will still be widely available over-the-air.

Broadcasters are actually earning far more revenue than their cable programming counterparts. According to Home & Garden, the advertising revenue of the four major broadcast networks alone is over $5 billion more than that of all the cable program networks combined.[22] Clearly broadcasting does not need a further handout to preserve its place in the television market.

Moreover, as HBO and TBS explain, broadcasters' well-being is less dependent on mandatory carriage than when the *Turner* cases were decided, because broadcasters now have enormous potential for multiple revenue streams generated through multiple digitally-compressed over-the-air-channels and ancillary services.[23] Their ability to raise additional revenue changes the broadcasters' economics, and makes this an entirely different factual scenario than the Court faced in *Turner*.

The Commission must also question the implicit assumption that broadcasters deserve the unique status they have occupied since analog must-carry rules were imposed. Chairman Kennard suggests:

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21. Comments of ALTV at 33.

22. See Comments of Home & Garden Television and Television Food Network at 15-16 and n.30 (citing Paul Kagan Associates, Inc.).

23. See Comments of Home Box Office and Turner Broadcasting System, Inc. at 17-18.

> As cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive these channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?[24]

Even the NPRM acknowledges that many cable operators are offering diverse local programming.[25] As such, digital must-carry is not necessary and will not protect free, over-the-air programming.

2. Digital Must-Carry Rules Would Not Promote the Widespread Dissemination of Information From A Multiplicity of Sources

Mandatory carriage of digital signals would thwart the interest in promoting the widespread dissemination of information from a multiplicity of sources. As explained in the comments of BET, NCTA, Discovery, and others, requiring carriage of broadcasters' digital signals will force cable operators to drop cable programs. Programmers that serve targeted audiences, such as BET, will likely be dropped first, and from the most systems. Consumers will be the ones that suffer the loss of this diverse programming.[26]

The potential for programming being dropped is real, as discussed in greater detail below. The Commission should note that programmers are more vulnerable to digital must-carry than they were to analog must-carry. When the analog must-carry rules were adopted, only ten percent of broadcast programming was not already being carried. Now, however, not 10% but 100% of the

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24. Remarks by FCC Chairman William E. Kennard before International Radio and Television Society, September 15, 1998 at 4.

25. NPRM ¶ 16.

26. BET is not alone in its concern. Indeed, members of the Congressional Black Caucus have expressed their fears regarding the "dramatic, negative impact" of digital must-carry on the diversity of television programming. See, e.g., Comments of Ameritech New Media at 23 n. 54 (quoting letter from Rep. Maxine Waters to Chairman Kennard).

digital programming will need carriage, causing far greater harm. As the diversity of programming voices diminishes, all consumers will suffer. Therefore, the Commission should look to means other than digital must-carry to effectuate the transition to digital.[27]

3. Digital Must-Carry Rules Would Not Promote Competition

Finally, digital must-carry would not serve the interest in promoting competition in the television market.[28] The existing competitive balance is weighted heavily in favor of broadcasters, who already enjoy the benefits of analog-must carry rules, lucrative retransmission consent agreements, and a tremendous federal subsidy in the form of free spectrum.[29] Cable programmers, in contrast, have no such weapons in their competitive arsenal. As a result, cable programmers do not occupy a privileged position vis-a-vis broadcasters -- they are instead competitively disadvantaged. In fact, some cable programmers must pay cable operators to carry their

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27. Further, the possible compression of digital TV signals yields a potential must-carry obligation for up to 6 SDTV signals per TV station in each market. Such an outcome is clearly unconstitutional and unwarranted as a matter of public policy.

28. A mere plurality of the Justices in *Turner* believe the interest in promoting fair competition was furthered by the analog must-carry requirements. *Turner II*, 117 S. Ct. at 1190-93. Consequently, this objective has less relevance than the other two objectives.

29. As discussed below, these same privileges make it difficult, if not impossible, for cable operators to be the gatekeepers or bottlenecks broadcasters claim they are. Furthermore, the subsidies broadcasters enjoy are even more significant now than when they were granted because all new broadcast licenses, in addition to licenses in nearly all other spectrum-based services, will be licensed by auction pursuant to the amendment of Section 309(j) in the Balanced Budget Act of 1997.

programming.[30] How can cable programmers possibly occupy a favored position, as some broadcasters suggest, if they must pay cable operators to be carried?

Furthermore, there is no merit to the claim that cable programmers in which Liberty Media has a stake are the biggest beneficiaries of the digital expansion.[31] Liberty Media has an interest in BET, yet BET still must compete for carriage like other programmers. Broadcasters cannot continue to ignore the harm digital must-carry would cause cable programmers, and must not be permitted to persist in their unwarranted assertion that they deserve priority carriage over cable programmers.

4. Cable Operators Are Not Gatekeepers or Bottlenecks

Some broadcasters continue to offer the tired and shopworn argument that cable operators are a bottleneck to consumers receiving numerous and diverse programming, or a gatekeeper that controls access to cable.[32] In truth, if there is any "bottleneck" to consumers receiving digital programming, it is the absence of HDTV sets, which is due primarily, if not exclusively, to their prohibitively high cost and limited availability.[33] Cable operators are not responsible for those

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30. See Comments of Home & Garden Television and Television Food Network at 9-11 and n. 13 (discussing launch fees per subscriber) and n.15 (describing fees cable networks pay for carriage and the debt and deferred earnings problems that result, making cable networks' viability questionable).

31. See Comments of Associations of America's Public Television Stations et al. at 22 n.39.

32. See, e.g., Comments of ALTV at Executive Summary; Comments of Association of America's Public Television at 17; Joint Comments of Barry Telecommunications et al. at 2; Comments of Benedek Broadcasting et al. at 4; Comments of Corporation for General Trade, Inc. at 4; Comments of Entravision Holdings, LLC at 5; Comments of Paxson Communications Corporation at 18; Comments of Trinity Broadcasting Network at 7; Comments of NAB 6, 11, 18-21.

33. See Comments of Discovery at 30-31; Comments of Lifetime Entertainment Services at 15. Moreover, prices of HDTV sets are expected to remain out of reach for 90% of consumers (continued...)

problems, nor will digital must-carry solve them. Some broadcasters recognize this, and therefore oppose digital must-carry.[34]

Cable operators have little if any power to exclude broadcasters from carriage because the existing must-carry rules ensure carriage and give cable operators no discretion to exclude broadcasters (even if they wanted to). During the transition to digital, analog must-carry rules will remain in effect, requiring cable operators to include analog broadcast signals on their systems. It is broadcasters who wield the real power through their must-carry/retransmission consent elections. Whatever control remains will be exercised by consumers, who, through the use of A/B switches and antennae, will control what they see.[35] There is no merit to the gatekeeper/bottleneck claims in the digital TV world.

5. The Proposed Digital Must-Carry Rules Are Not Sufficiently Narrowly Tailored

All of the proposed digital must-carry rules are too restrictive to satisfy the *Turner* test. BET has explained this at length in its Comments at pp. 28-33 and will not repeat those arguments here. However, BET is compelled to respond to several arguments that mischaracterize the burden a digital must-carry regime would force cable operators and programmers to bear.

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33. (...continued)
for the next ten years. *Communications Daily*, December 9, 1998, at 8.

34. See, e.g., Comments of Home & Garden Television and Television Food Network at 8 (discussing position of broadcaster Scripps).

35. See Comments of Discovery at 30.

Some parties argue that the statutory 1/3 channel capacity cap makes any burden on cable operators and cable programmers small, or even de minimis.[36] They are wrong. Cable operators with channel-locked systems will have no choice but to drop existing programming in order to meet additional must-carry requirements for DTV. Even systems that have some unused capacity would likely be forced to drop programming in order to accommodate the influx of digital channels. The 1/3 capacity cap will afford even less relief than in the analog context because only ten percent or so of broadcast programming was not being carried when the analog must-carry rules were imposed. Here, in contrast, none of the digital signals are presently being carried. The 1/3 cap is simply not enough to relieve the undue burden on cable operators and programmers caused by the addition of completely new, never-before carried programming.[37]

Similarly, the argument that adding mandatory DTV carriage requirements are not burdensome because they would be temporary is wrong.[38] As explained in BET's comments, the Balanced Budget Act permits broadcasters to extend indefinitely the time they have to transmit both analog and digital signals. Consequently, the 2006 date for the return of analog spectrum is not a

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36. See Comments of Named State Broadcasters Associations at 4; Comments of NAB at 26.

37. Some broadcasters believe they can wish this problem away by asking the Commission to ignore the 1/3 cap because it is supposedly an "anachronism." See Comments of ALTV at 49 n. 129; Comments of Sinclair at 6-7. In essence, they are asking the Commission to ignore a clear, congressionally-mandated limitation that Congress has not seen fit to repeal.

38. See Comments of Morgan Murphy Stations et al. at 9. Moreover, that argument suggests that it is appropriate to sacrifice speech in the name of an early and rapid transition to DTV. But as Commissioner Powell has cautioned, "This is the most dramatic change in television ever. It's more important that it be done right, rather than just quickly for its own sake." "The Medium They Couldn't Kill," *The Dawn of Digital Television*, a supplement to *Broadcasting & Cable*, at S10.

deadline at all. In reality, the transition will likely take a much longer time. Color television took 18 years to reach 50% penetration,[39] and 22 years to reach 85% penetration.[40] Reaching 85% digital penetration will surely take even longer.[41]

Finally, as described in BET's Comments, there is far too much uncertainty surrounding what consumers want and numerous other issues to justify the imposition of digital must-carry rules at this time. Even the NPRM acknowledges the rampant uncertainty in the digital transition.[42] Given this uncertainty, the Commission cannot show that the proposed rules support an important government interest or are sufficiently narrowly tailored.[43]

For all of these reasons, the proposed digital must-carry rules violate the First Amendment. Accordingly, the Commission should not require carriage of digital signals during the transition.

B. Digital Must-Carry Violates the Fifth Amendment

NCTA and several cable operators have argued persuasively that imposing a digital must-carry scheme would constitute a taking of cable operators' property without just compensation. Such

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39. See Comments of the Cable Telecommunications Association ("CATA") at 8-9.

40. "The Medium They Couldn't Kill" in *The Dawn of Digital Television* supplement to *Broadcasting & Cable* at S7. Many other popular devices have taken many years to reach 85% penetration. VCRs took 16 years, while CDs, which might seem ubiquitous, have reached only 68% penetration after 13 years. *Id.*

41. In fact, some predict that it may take until 2025 to reach the 85% DTV penetration level. *Communications Daily*, December 3, 1998, at 8.

42. See Comments of BET Holdings II, Inc. at 24-27 (discussing NPRM ¶ 17-18, 25-31, 49).

43. For the same reason, making decisions about "material degradation, "primary video," and other definitions is also premature. Until much of this uncertainty is resolved, the Commission should refrain from forcing definitions and standards that will likely not fit the facts that ultimately emerge in the digital transition.

a taking would violate the Fifth Amendment to the Constitution, which prevents the government from taking private property for public use without just compensation to the owner. U.S. Const., Amdt. V.[44] The purpose of prohibiting uncompensated takings is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[45] BET supports these commenters' takings claims and urges the Commission to recognize this additional constitutional infirmity that plagues the proposed rules.[46]

Moreover, BET notes that the proposed rules will effect a taking of the property of BET and other cable programmers, leaving cable programmers little choice but to litigate their takings claims.[47] Creating additional must-carry-related litigation will not be beneficial to the Commission or the public,[48] particularly since programmers are likely to prevail on their claims.

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44. See Comments of NCTA at 32-37 ; Comments of Time Warner Cable at 26-30; Comments of CATA at 17-25, Comments of Cablevision Systems Corporation at 14-15.

45. *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S. Ct. 1563 (1960); *see also, Eastern Enterprises v. Appel*, 1998 U.S. Lexis 4213, *43-44 (1998) (plurality).

46. The proposed must-carry rules will effect a classic taking of the property of cable system operators in that they will require cable operators to use their property -- their systems -- to carry commercial broadcasts, and force them to drop programmers from whom they derive economic benefit through contracts for carriage. This forced physical occupation of cable operators' property constitutes a compensable taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982) (holding that New York law requiring landlords to permit cable television facilities to be installed on their property constituted a taking compensable under the Fifth Amendment).

47. When litigated, the takings claim will implicate three distinct issues: "whether the interest asserted by the plaintiff is property, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the property." *Phillips v. Washington Legal Foundation*, 114 L.Ed.2d 174, 118 S. Ct. 1925, 1998 U.S. Lexis 4003, *25 (1998); *see also id.*, 1998 U.S. Lexis 4003 at *26 (Souter, J., dissenting).

48. Among other things, litigation, even if ultimately decided in the Commission's favor, will (continued...)

Imposing digital must-carry rules that destroy the property rights of BET and other programmers without just compensation will be anything but fair and just governmental action. This unfairness arises because the proposed rules single out cable programmers to bear a substantial and disproportionate burden in the transition to digital. There is no legitimate basis for disfavoring cable programmers, which implicates the fundamental principles of fairness that underlie the takings clause.[49] Furthermore, the governmental action at issue is unfair because the digital must-carry rules exceed the scope of the Commission's statutory authority, do not serve the interests Congress identified in enacting the Cable Act, and foist digital technology upon consumers and industry without any indication that consumers want or need it.

In considering the digital must-carry proposals, the Commission would do well to heed the Supreme Court's admonition almost eighty years ago:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[50]

The Commission should not put its own desire to promote digital television (a desire that has not been shown to be a "strong public desire") above the mandates of the Constitution. Because a

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48. (...continued)
delay imposition of new rules for years.

49. Stated differently, that the Commission would propose rules that would drive one segment of the cable industry, niche programmers, out of business while giving a windfall to large broadcasters and their affiliated programmers, "implicates fundamental principles of fairness underlying the Takings Clause." *Eastern*, 1998 U.S. Lexis 4213 at *69.

50. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L.Ed. 322 (1922).

compensable taking will occur if digital must-carry rules are implemented, the Commission must decline to adopt them.

IV. Channel Capacity Is A Legitimate Issue That Broadcasters Concede Is A Problem

In its Comments, BET argued that most cable systems are channel-locked. NAB and some broadcasters try to claim otherwise, but the data demonstrate that cable systems lack the capacity necessary to handle simultaneous mandatory carriage of digital and analog signals during the transition to digital. NAB, not surprisingly the most vocal proponent of digital must-carry, claims that channel capacity is a non-issue. But NAB does not speak for all broadcasters,[51] and the Commission must not assume that it does.[52]

Several broadcasters acknowledge that the capacity problem is real. For example, Pegasus attempts to alleviate the valid concern about channel capacity by suggesting that the FCC should adopt rules applicable only during the transition that allow broadcasters to choose carriage of either the analog or digital signal, but not both.[53] Similarly, the Association for Maximum Service

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51. See *Broadcasting & Cable*, November 30, 1998, at 110 (describing broadcast industry split over digital must-carry, with NAB "left to paper over the divide between its members.").

52. Nor does NAB speak for all broadcasters when it claims that digital must-carry is statutorily mandated, constitutional, and necessary. In fact, one major broadcaster, NBC, took no position on digital must-carry. See generally Comments of National Broadcasting Company, Inc. Another broadcaster, The E.W. Scripps Company, actively opposes digital must-carry. See Comments of Home & Garden Television and Television Food Network at 1. Interestingly, Scripps supported the analog must-carry requirement, but opposes digital must-carry requirements because of "fundamental changes in the video programming marketplace, brought about in large part by passage of the Telecommunications Act of 1996." *Id.* at 2. Other broadcast networks did not file in support of digital must-carry rules, underscoring the fact that NAB does not speak for the entire broadcast industry.

53. Comments of Pegasus at Communications Corporation at 4-5. Several other parties advocate (continued...)

Television, Inc. ("AMST") acknowledges that channel capacity is a real problem, and proposes a capacity-based alternative for digital must-carry.[54]

While BET maintains that digital must-carry in any form is statutorily and constitutionally impermissible, it agrees with Pegasus and AMST that inadequate channel capacity is a fact the Commission cannot ignore.[55] The capacity problem is real. The average 44 channel systems has 23 channels it must use to air the programming of 250 cable networks.[56] Approximately two-thirds of cable subscribers are served by cable systems that currently have no excess channel capacity.[57] This data has not been refuted.[58]

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53. (...continued)
this either/or approach. However, there is absolutely no statutory support for such a rule.

54. Comments of Association for Maximum Service Television, Inc. at 50-53. However, as discussed below, BET disputes the Association's claim that upgrades to cable systems that increase capacity should be used to accommodate additional signals.

55. Apparently, even NAB does not completely disagree, as one of its own exhibits demonstrates that one cable channel will be lost for each broadcast channel added to cable because of DTV must-carry. See "Legal Issues Head Digital Must-Carry," Appendix C to NAB Comments.

56. Comments of America's Health Network et al. at 22.

57. See Comments of NCTA at 41.

58. NAB's attempt to refute this data is weak at best. For example, footnote 30 of NAB's Strategic Policy Research ("SPR") analysis indicates that SPR included "only those systems that had reported cable subscribers channel capacity and unused channels" in concluding that the average cable system had 4.3 unused channels. Such averages are inherently suspect because they are not based on complete data. In fact, very few systems have 4 or more unused channels. For a detailed examination of the flaws in SPR's analysis, see NCTA's Reply Comments, which BET fully supports.

The ramifications of the lack of channel capacity are profound.[59] When analog must-carry was enacted, various cable channels were dropped, notwithstanding NAB's claim to the contrary. C-SPAN was not the sole victim.[60] The Weather Channel, for example, was dropped in several hundred thousand homes.[61] Lifetime Entertainment Services also notes that despite 14 years of successful operation and widespread acclaim, it has still been unable to serve 5 million homes. Moreover, when the analog must-carry rules were implemented, many systems throughout the country dropped or threatened to drop Lifetime Television. Its new service, Lifetime Movie Network, is having grave difficulties reaching a mere 3 million households due to the scarcity of

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59. Even some broadcasters recognize that programming will have to be dropped due to capacity problems if DTV must-carry is implemented. Entravision, for example, claims that its minority-targeted broadcasting is most likely to be dropped because it is least likely to produce ad revenue. See Comments of Entravision at 7. Although BET and Entravision agree on the probable loss of programming, BET disputes the notion that minority-targeted broadcasters will be dropped before minority-targeted cable programmers and therefore deserve greater protection. There is no reason why a minority-targeted broadcaster should be given preference over a minority-targeted cable programmer; both should be able to compete on equal footing.

60. In the analysis included in NAB's Comments, SPR makes the outrageous and offensive claim that BET is a "poster-child" in the must-carry debate. SPR Analysis at 8 n.17. BET and other programmers face a real threat, as demonstrated above. NAB's claim that BET was not harmed by analog must-carry because it has added subscribers since the advent of analog must-carry does not mean BET has not been harmed. SPR Analysis at 10. A net gain in subscribers cannot account for the large number of subscribers BET would have added had it had a fair shake in competing for carriage. The fact that BET was able to grow in the analog must-carry environment says nothing about how it will fare in a digital must-carry environment, where available capacity will be greatly reduced and the burden of mandatory DTV carriage will be orders of magnitude greater than the analog must-carry burden.

61. Comments of the Weather Channel, Inc. at 8.

available channel capacity.[62] With digital must-carry, many cable programmers will likely be wiped out throughout the country.

Several parties argue that digital must-carry will not be burdensome because cable operators are adding, or will add, channel capacity. However, adding more capacity is not the answer. Even though some cable systems are increasing capacity, the number of cable programmers is growing faster than channel capacity can accommodate.[63] For example, when TCI expanded its system in Washington, D.C. to add 36 new channels, all were quickly allocated: 8 for pay-per-view offerings, 3 to multiplex existing premium services, 10 for digital movie services, and 15 to add new programming services or existing services not previously carried on the system. Many programming services, such as The Weather Channel, did not gain carriage even though 36 new channels were added.[64] As the number of programmers continues to increase, and as they produce more programming, the competition for channel space will become even more fierce.[65]

Furthermore, not all of the capacity being added is intended to accommodate television programming. Cable operators have a legitimate interest in adding capacity for other new technologies that serve the public's needs and demands. The Commission likewise has a legitimate interest in promoting technologies that serve the public interest. Cable operators should not be

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62. Comments of Lifetime Entertainment Services at 4.

63. See NCTA Comments at 47 and accompanying table (demonstrating that the growth of national cable video networks has outpaced channel capacity by a margin of 3 to 1).

64. See Comments of the Weather Channel, Inc. at 16-17.

65. Even now, according to TCI's executive vice president of programming, "There's such a huge number of channels out there, you simply can't carry them all." "Cable Gets With The Program," *Broadcasting & Cable*, November 30, 1998, at 60.

forced to devote all new capacity to DTV, as the broadcasters suggest, particularly when there is no evidence demonstrating that doing so would serve the public interest. Operators are not likely to upgrade their systems if they cannot put the expanded capacity to its most productive use. Consequently, if the Commission adopts digital must-carry rules and requires cable operators to devote all new capacity to DTV, the net effect will be to discourage the growth of cable systems, and consequently the growth of new and innovative services -- all of which will harm the public interest.[66] To avoid this harsh result, the Commission must reject the invitation to promote digital television to the exclusion of all other technologies by forcing cable operators to devote all new capacity to DTV.

The Commission should keep in mind that cable companies are adding channel capacity in order to give consumers what they want, be it additional premium services or other technologies.[67] Cable operators should be able to serve consumer demand, for only in that way can they truly serve the public interest. Surely the Commission would like cable operators to provide consumers the services they want, rather than to devote existing and upgraded channel capacity to DTV when there is no evidence that consumers want it.[68]

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66. See Comments of Lifetime Entertainment Services at 16.

67. See, e.g., Comments of MediaOne Group, Inc. at 21-25.

68. Of course, if consumers indicate that they want to receive DTV signals through their local cable operators, those cable operators will surely deliver DTV in order to stay competitive and serve their customers.

Channel capacity is thus a major issue that cannot be ignored. The scarcity of channel capacity and the fierce competition for available channel space argue against digital must-carry. Therefore, the Commission should not impose digital must-carry rules.

V. Digital Must-Carry Will Harm Consumers

In addition to the constitutional and statutory problems described above, implementing digital must-carry will harm consumers. Diminished diversity in sources of programming available to consumers will be one inescapable adverse consequence of the proposed digital must-carry rules, as more and more cable programming is dropped to satisfy the regulatory burden. Most consumers will not be able to view dropped cable programming via another media. Even if a cable program dropped from a cable system is carried on all non-cable MVPDs, it would reach only 9.5 million subscribers, leaving the vast majority of television viewers with no access to that programming.[69] Thus, most consumers would have no way to view their favorite programs once digital must-carry forces cable systems to drop them. Nor will most consumers be able to receive new cable program offerings that cannot be launched on cable due to digital must-carry. Consumers may also suffer financially from a digital must-carry regime. In addition to the high cost of acquiring digital

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69. See Comments of America's Health at 18; Comments of Home & Garden Television and Television Food Network at 12 n.20.

television equipment should they wish to view DTV,[70] consumers may face increased cable rates to pay for the expansion of cable capacity that digital must-carry would require.[71]

The Commission should recognize that these increased costs and programming losses will be imposed on consumers in the name of a technology that consumers don't want.[72] ALTS and Granite are off the mark in claiming that consumers are clamoring for DTV - most don't even know what it is.[73] Instead, many citizens view DTV and digital must-carry as interfering with their ability to choose the mix of programming they desire.[74]

BET refers the Commission to the analysis in its Comments of the numerous harms consumers will suffer if DTV must-carry is implemented. For the reasons set forth herein and in BET's Comments, the Commission must not be the source of the numerous and varied harms that digital must-carry has the potential to cause.

VI. Voluntary Arrangements Between The Industry Players Should Control

As explained in comments filed by such diverse parties as BET, BellSouth, Microsoft, Cablevision, MediaOne, TCI, General Instrument, and various cable programmers, the Commission should allow market forces to govern the transition to DTV, and should allow the key players to

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70. In fact, high HDTV set prices may take years to fall. Forrester Research predicts that HDTV sets will cost over $2000 for the next ten years, keeping true HDTV "economically out of reach for 90% of consumers." *Communications Daily*, December 9,1998, at 8.

71. Comments of America's Health at 31.

72. See Comments of BET Holdings II, Inc. at 25 n.53.

73. *Id.* (indicating that only 59% of adults have even heard of DTV, and that many of those who have heard of it completely misunderstand what it is).

74. See, e.g., Comments of President of Citizens for C-SPAN at 4.

define the terms of the transition. In light of the tremendous uncertainties surrounding the transition, the lack of a statutory mandate, and the constitutional problems to be avoided, the Commission should decline to adopt digital must-carry rules.

The Commission predicts that retransmission consent agreements and private negotiation will likely be the norm for digital television transmission.[75] That prediction is already coming true, as parties are currently negotiating for, and in some cases have agreed upon, the carriage of digital television. For example, CBS and Time Warner recently announced that they have reached an agreement whereby Time Warner will carry each CBS-owned DTV station as soon as it is on the air.[76] NBC also reports that it is "very actively" working on carriage deals and hopes to have them in place within a year.[77] MediaOne Group indicates that 1/3 of its retransmission consent agreements (62 out of 187) already have digital carriage provisions.[78]

These examples demonstrate that the existing regime is working in a way that supports digital television, and that digital must-carry (much like analog must-carry) is not necessary for the vast majority of broadcasters. The market is already at work, and the Commission should not interfere with it. Many parties, including some broadcasters, do not even support digital must-carry. As previously mentioned,[79] NBC took no position on the issue, and the other major broadcasters did not even comment. Scripps actively opposes it. By implication, these parties trust in the marketplace,

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75. NPRM ¶ 33.

76. See *Communications Daily*, December 9, 1998, at 1.

77. *Id.*

78. See Comments of MediaOne Group at 7.

79. See *supra* n. 52.

or, at least, do not object to resolving the must-carry controversy via the marketplace. The cable overbuilders likewise recognize that voluntary agreements are the most effective mechanism for launching DTV cable carriage since the interests underlying analog must-carry do not apply readily to DTV.[80] Voluntary negotiations are the only practical means of achieving the transition to digital.[81] Accordingly, the Commission should not impose digital must-carry rules.

VII. Concerns About Over-The-Air Reception of DTV Signals And A/B Switches Are Unfounded

Some parties express concern about the over-the-air reception of DTV signals. Those concerns are unfounded and, even if they were well-founded, would not form the basis for imposing digital must-carry rules.[82] As Philips Electronics explains at length, the concern that consumers will have difficulty receiving DTV signals over-the-air is based on "statistically misleading findings from unreliable field tests using only a very limited number of relatively immature receiver

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80. Comments of BellSouth Corporation et al. at 24-28.

81. Voluntary negotiations have been successful in other aspects of the DTV transition, such as disputes about technical standards. For example, as described by Chairman Kennard, the recent firewire agreement between NCTA and CEMA illustrates that the private sector can resolve even the thorniest issues. "Easing the Digital Path," *Broadcasting & Cable*, November 23, 1998, at 48.

82. The underlying goal of must-carry rules is to protect non-cable viewers. *Turner I*, 114 S. Ct. at 2461, 2464; *see also*, S. Rep. No. 102-92, p.60. Digital must-carry will not achieve that goal if the broadcasters' dire predictions about over-the-air reception of DTV signals are correct. In the analog context, must-carry was premised on the belief that carriage on cable systems would generate enough revenue so that broadcasters could provide robust broadcast television for non-cable viewers. However, in the DTV environment, if DTV signals cannot reach non-cable homes over the air as broadcasters claim, cable carriage of DTV signals is pointless, because non-cable viewers won't be able to receive the broadcast programming created from broadcasters' increased revenue. In reality, then, if the broadcasters' predictions are correct, digital must-carry would only serve to further subsidize broadcasters, without benefiting non-cable consumers.

implementations."[83] Moreover, as Philips observes, it is "unthinkable" that it, or any consumer electronics manufacturer, would knowingly offer consumers a DTV receiver that does not provide high quality over-the-air DTV reception.[84] Manufacturers would be foolish, if not suicidal, to sell consumers $5,000 to $10,000 receivers that do not deliver what the consumer expects.

Similarly, there is no merit to the contention that A/B switches are not a viable alternative to mandatory carriage of digital signals. The A/B switches of 1998 are a breed apart from those considered in *Turner II*. Indeed, the *Turner II* Court's findings on A/B switches were drawn from sources that are now more than 12 years old - a veritable eternity in technology terms.[85] Even the Commission recognizes the nearly ubiquitous and convenient nature of A/B switches.[86] As Discovery makes abundantly clear in its comments, the present state of A/B switch technology undercuts the need for digital must-carry.[87]

VIII. The Commission Should Not Employ Technical Standards That Operate As De Facto Must-Carry Rules

The equipment manufacturers suggest various technical fixes that would have the same practical effect on the diversity of programming sources as digital must-carry.[88] BET appreciates

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83. Comments of Philips Electronics North America Corporation at 13-14.

84. Comments of Philips Electronics North America Corporation at 19.

85. Discovery Comments at 25-26 (citing *Turner II*, 117 S. Ct. at 1213 (O'Connor, J., dissenting)).

86. NPRM at ¶16, 88.

87. See generally Discovery Comments at 25-30.

88. NCTA is submitting with its Reply Comments a technical paper that responds to the arguments of the equipment manufacturers, particularly CEMA. BET refers the (continued...)

the need for technical standards that will make the transition to digital workable as a practical matter. However, standards that act as a de facto digital must-carry regime will have the same statutory and constitutional defects, and will be bad policy, with extremely negative consequences for consumers. Consequently, the Commission should ensure that the technical standards it adopts are not disguised digital must-carry rules.

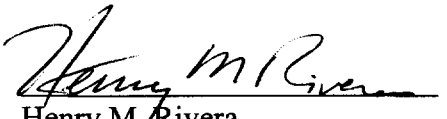
IX. Conclusion

For the reasons set forth herein and in BET's Comments, the Commission should not impose digital must-carry rules because they lack a statutory basis, are unconstitutional, and would cause grave harm to consumers. If DTV is in fact the technology of the future, voluntary negotiations and consumers preferences will ensure its place in the American home. Premature and impermissible regulation, however, is not the answer.

Dated: December 22 , 1998

Respectfully submitted,

BET HOLDINGS II, INC.

by: 

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88. (...continued)
Commission to that paper for a cogent discussion of the technical standards issue.

CERTIFICATE OF SERVICE

I, Sherle Dewitt, a secretary in the law firm of Shook, Hardy, & Bacon L.L.P., do hereby certify that I have, on this 22nd day of December, 1998, sent by hand delivery copies of the foregoing "REPLY COMMENTS OF BET HOLDINGS II, INC." to the following:

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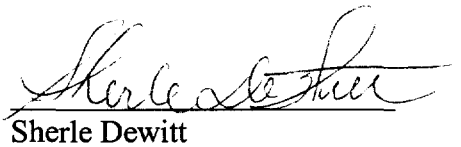

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